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Supreme Court of the United States

OCTOBER TERM, 1955.

No. 699

UNITED STATES OF AMERICA,
Petitioner,

vs.

WHITE BEAR BREWING CO., INC., AND CHICAGO TITLE AND TRUST COMPANY, AS TRUSTEE, ET AL.,
Respondents.

BRIEF OF THE RESPONDENTS, WHITE BEAR BREWING CO., INC., AND CHICAGO TITLE AND TRUST COMPANY, AS TRUSTEE, IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

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OPINIONS BELOW.

The District Court's memorandum opinion, which is not reported, is printed as Appendix A, *infra*, pp. i-v. The opinion of the Court of Appeals for the Seventh Circuit is published at 227 F. (2d) 423 and is printed in Appendix A of the Petition for Certiorari (pp. 1a-29a).

Both the District Court and the Court of Appeals held that under the facts of this case the mechanic's lien here involved was specific and choate when it was recorded and that it was therefore entitled to priority over the federal

tax liens which arose subsequently, under the doctrine of *United States* v. *New Britain*, 347 U. S. 81 (1954), that "first in time is first in right."

The District Court also held that the maintenance of the present suit by the United States was precluded by the doctrine of *lis pendens* and the rule of the immunity of completed judicial proceedings from collateral attack in a subsequent suit. The Court of Appeals found it unnecessary to reach this second point because of its decision as to priority, but stated that the respondents' arguments "suggest some merit."

QUESTIONS PRESENTED.

The issue is whether the United States by this case can take real property away from those who previously purchased it and made a mortgage loan on it in good faith reliance on title coming through a mechanic's lien foreclosure and sale, and have the property resold to satisfy federal tax liens that arose after the recording of the mechanic's lien and during the pendency of the foreclosure suit.

The Petition for Certiorari incorrectly states that the question is "whether liens for unpaid federal taxes • • • are superior to an inchoate mechanic's lien." (p. 2) That statement assumes that the mechanics' lien was inchoate when the tax liens arose, whereas the mechanic's lien in this case was recorded as a specific and choate lien *prior* to the time when the tax liens arose. Furthermore, the Petition for Certiorari does not discuss the issues of the applicability of the rules of *lis pendens* and *collateral attack* which were raised in the District Court and Court of Appeals below.

On the matter of priority, the question really is:

1. *Whether federal tax liens are entitled to priority over a previously recorded mechanic's lien.*

This involves a consideration of the holding of both Courts below that the mechanic's lien was specific and choate when recorded.

On the matter of the rules of *lis pendens* and *collateral attack*, the question is:

2. *Whether the United States, in a new suit filed long after the respondents acquired title to real property coming through a mechanic's lien foreclosure decree and sale, can collaterally attack the foreclosure decree previously entered in a state court proceeding which was pending when the federal liens for taxes against the property first arose.*

The answer to this second question constitutes an independently sufficient reason why the decision of both courts below is correct.

STATUTES INVOLVED.

Of the many sections of the Internal Revenue Code listed in the Petition for Certiorari as "Statutes Involved" (pp. 2, 31a-35a), Sections 3670 and 3671 are the only sections which have a bearing on this case; and they are the only sections mentioned in the body of petitioner's argument. These sections provide that the United States shall have a lien for unpaid taxes "upon all property and rights to property" of the taxpayer, and that "the lien shall arise at the time the assessment list was received by the collector." Sections 3672, 3678, 3679, 3690, 3692 and 3700 have no bearing on the case.[1]

The petitioner no longer relies, as it did in the courts below, on Section 3466 of the Revised Statutes (31 U. S. C. Sec. 191) pertaining to insolvent debtors. That statute does not apply, since the taxpayer was not insolvent (Opinion below, p. 16a of Petition).

The Illinois Mechanics' Lien Act, Ill. Rev. Stats. (1955),

[1] Section 3672 of the Code is inapplicable: it provides that the tax lien, even after it has arisen, shall not be valid against certain persons until it has been recorded; that section does not affect persons acquiring interests or liens *before* the tax lien arose (as in the present case). Section 3678 provides that the Attorney General may file a civil action to enforce a tax lien against a taxpayer's property, but that section does not purport to determine any of the questions involved in this case. Section 3679 and Rule 4 of the Federal Rules of Civil Procedure are also inapplicable: they set forth the procedures by which a private lienor may file a civil action to clear title to realty against which the United States had previously filed its notice of tax lien; obviously they do not apply to a private lienor who has filed his civil action (such as the mechanic's lien foreclosure suit here) not only prior to the filing of the federal tax liens but even before any federal tax lien existed. Sections 3690, 3692 and 3700 are inapplicable: they provide for distraint and sale of property of a delinquent taxpayer; no such procedure is involved in this case; and these sections do not purport to authorize the elimination of pre-existing liens.

Ch. 82 (pp. 36a-40a of Appendix B to the Petition), and particularly Section 7 (p. 36a) which provides for recording of the lien, is also involved, as well as the Illinois *lis pendens* statute, Ill. Rev. Stats. (1955), Ch. 22, Sec. 53 (which is printed in Appendix B, *infra*, p. vi).

STATEMENT OF THE CASE.

The Statement in the Petition for Certiorari is inaccurate and deficient in several important respects. The respondents, White Bear Brewing Co., Inc. and Chicago Title and Trust Company, as Trustee, are not transferees from the taxpayer, Frederick's Brewing Co. (also known as McAvoy Brewing Company) as stated in the Petition for Certiorari (p. 2). The taxpayer was a former owner of the real property in question, whose interest in the property had been wiped out by the mechanic's lien foreclosure proceeding which had been instituted before the tax liens of the United States arose. Respondent White Bear Brewing Co. later purchased the property in good faith for value ($36,000) from a person who had acquired his title from the grantee under the master's deed issued pursuant to the foreclosure sale, all long before petitioner filed this suit to resell the property in satisfaction of its tax liens. Respondent Chicago Title and Trust Company is the trustee under a first mortgage trust deed, also taken in good faith for value ($31,000) at the time of the purchase of the property by respondent White Bear Brewing Company. Frederick's Brewing Company (the taxpayer which lost its title by foreclosure), the mechanic's lien holder and the intervening title holders have no present interest in the property and are not parties to this appeal.

The chronology of events is very important in this case. It is accurately stated in a table at the outset of the opinion of the Court of Appeals (pp. 2a-6a of Appendix A to Petition). Because of its very great significance to a correct determination here, a brief summary from that table is printed below:

May 19, 1947 — Work completed pursuant to contract between mechanics' lien claimant and taxpayer for improvements to the realty in question.

September 2, 1947—Mechanics' lien recorded. It contained all specific details of the lien, including the name of the lienholder, the legal description of the real estate and the amount of the lien ($8,286.00, plus interest).

November 13, 1947—Suit for foreclosure of mechanics' lien filed in Circuit Court of Cook County, Illinois (summons served on taxpayer November 15, 1947).

November 17, 1947—Assessment list for first of several federal taxes received by the U. S. Collector, First District, Illinois.

December 16 and 29, 1948—Tax liens aggregating $16,217.46 recorded.

April 28, 1949—Decree of foreclosure and sale entered in mechanics' lien suit. Tax liens aggregating $7,922.01 recorded.[2]

June 28, 1949—Foreclosure sale held and property sold at public auction.

September 22, 1949—Certificate of foreclosure sale issued and recorded.

September 30, 1949—Foreclosure sale approved by Court.

September 28, 1950—Master's deed issued to assignee of certificate of sale (no redemption having been made within the statutory period of 15 months).

November 2, 1950—Master's deed recorded.

July 22, 1952—Deed to respondent White Bear Brewing Co., Inc., and purchase-money mortgage to re-

[2]The record does not indicate the time of entry of the foreclosure decree. The tax lien was recorded at 4:44 p. m. (R. 12).

spondent Chicago Title and Trust Company, as trustee, recorded.

November 10, 1953—The present suit filed in the District Court below seeking to have the property resold in satisfaction of federal tax liens.

The Court of Appeals made the very pertinent observation on the precise factual situation existing in the present case as follows:

> "This appeal reflects several singular distinguishing characteristics in contrast with the cases [relied on by petitioner]: (i) the mechanic's lienholder acquired, recorded and commenced his foreclosure suit before the first relevant assessment list was received by the U. S. Collector, (ii) the property involved has long since left the taxpayer's hands and MacAvoy Brewing Co. is completely divested of any title or interest, (iii) the government did not participate, in any manner, in the Illinois Mechanic's lien foreclosure proceedings despite Deutsch's prior recordation of his lien." (Page 20a, Appendix A of Petition.)

ARGUMENT.

I. THE DECISION BELOW IS IN STRICT ACCORD WITH THE DECISIONS OF THIS COURT AS TO THE RELATIVE PRIORITY OF FEDERAL TAX LIENS AND OTHER LIENS.

A. The Courts Below Correctly Held that the Previously Recorded Mechanic's Lien Was Entitled to Priority over the Subsequent Federal Tax Liens, in Conformity with the Decision of This Court in United States v. New Britain, 347 U. S. 81 (1954).

After carefully reviewing the facts of this case, the Court of Appeals concluded that:

> "It is quite clear that the only way the government can prevail on these facts is to have us reject the rule, 'the first in time is the first in right,' reiterated by Mr. Justice Minton in *United States* v. *New Britain*, 347 U. S. 81, 85 (1954)." (Petition for Certiorari, Appendix, p. 21a.)

In the *New Britain* case, this Court considered the relative priority of federal tax liens and municipal tax and water-rent liens. This Court noted that the taxpayer was not insolvent, and the nub of its decision was stated by Mr. Justice Minton in the following words:

> "* * * the federal statutes do not attempt to give priority in all cases to liens created under the paramount authority of the United States. The statute creating the federal liens here involved, I. R. C. §3670, does not in terms confer priority upon them. * * *
>
> "We believe that priority of these statutory liens is determined by another principle of law, namely, '*the first in time is the first in right.*' * * * This principle is widely accepted and applied, in the absence of legislation to the contrary. 33 Am. Jur., Liens, § 33; 53 C. J. S., Liens, § 10b. We think that

> Congress had this cardinal rule in mind when it enacted § 3670, a schedule of priority not being set forth therein. Thus, *the priority of each statutory lien contested here must depend on the time it attached to the property in question and became choate.*" (347 U. S., at 84-86, emphasis added.)

Holding that some, but not all, of the water-rent and tax liens "attached to the property and became choate prior to the attachment of the federal tax liens," this Court remanded the case for determination by the lower court of the times when the various competing liens had in fact attached. (347 U. S., at 86, 88.)

Applying the rule of the *New Britain* case to the facts in the present case, the mechanic's lien is entitled to priority over the federal tax liens if the mechanic's lien "attached to the property in question and became choate" before the federal tax liens arose. It is conceded by petitioner that the mechanic's lien attached to the property on September 2, 1947 (when the mechanic's lien was recorded in strict compliance with the Illinois Mechanic's Lien Act), more than two months before the first of the federal tax liens arose on November 17, 1947 (when the first of the tax assessment lists were received by the collector of Internal Revenue). (Petition for Certiorari, p. 3). Therefore, in this case the priority issue turns upon the question as to whether the mechanic's lien was choate when the federal tax liens arose (as the District Court and Court of Appeals held) or was then inchoate (as the Petition for Certiorari contends, pp. 2, 10). In petitioner's reply brief (p. 1) in the Court below, it candidly stated that the priority issue was simply this: "At what point in time should a mechanic's lien arising under the Illinois Act be considered fully perfected or choate as against a federal tax lien"?

The test as to when a lien becomes "choate" and "per-

fected" was stated by this Court in the *New Britain* case as follows:

> "The liens may also be perfected in the sense that there is nothing more to be done to have a choate lien—when the identity of the lienor, the property subject to the lien, and the amount of the lien are established." (347 U. S., at 84.)

In the present case, the mechanic's lien met these requirements and was "choate" when the lien was recorded on September 2, 1947, inasmuch as the recorded lien specified the lienor (Fred W. Deutsch), the property subject to the lien (the real estate here involved, by its legal description) and the amount of the lien ($8,286, with interest). The mechanic's lien in the present case was therefore "choate" and "perfected," just as were the liens involved in the *New Britain* case.[3]

Petitioner concedes that the mechanic's lien specified the lienor and the property subject to the lien, but contends that the amount of the lien was uncertain until the entry of a foreclosure decree, pointing out that the decree in this instance was for an amount greater than the amount specified in the recorded lien notice. Apparently petitioner overlooks the fact that the decree properly included

[3] While recognizing that the question of "choateness" of the mechanic's lien is a question of federal law, the Courts below further noted that the Illinois courts have held that an Illinois mechanic's lien is "perfected," "choate," and "consummate," once it has been recorded, as was done in this case. *Donn* v. *Auto Dealers Investment Co.*, 318 Ill. App. 95, 108 (1943); *Robertson* v. *Huntley & Blazier Co.*, 351 Ill. App. 378, 384 (1953); *Schoenberg Mfg. Co.* v. *Broadway Hotel Corp.*, 259 Ill. App. 40, 42 (1930); *United Cork Companies* v. *Volland*, 365 Ill. 564, 573 (1937). In both *Samms* v. *Chicago Title & Trust Co.*, 349 Ill. App. 413, and *Republic Nat. Life Ins. Co.* v. *Hedstrom*, 346 Ill. App. 555, cited by petitioner, the federal lien arose *before* the mechanic's lien was recorded and any references there to the status of the lien prior to recording are obviously inapplicable here where the federal lien arose *after* the mechanic's lien had become choate and perfected upon recording.

not only the principal amount specified in the lien notice but also interest, fees and costs. Moreover, in *Illinois* v. *Campbell*, 329 U. S. 362 (1944), which first set forth the threefold test of "choateness" reiterated in *New Britain*, this Court held that an error in computing the amount of the lien does not make it uncertain or indefinite or prevent the lien from meeting that particular requirement of choateness. This Court said:

> "It is true that the filing of notice of lien determined the amount of the lien, though the state may have computed wrongly the amount of taxes owed it. * * * The latter (notices of lien) also fixed the amounts of the liens, though miscalculated." (329 U. S., at 372, 375)[4]

Hence even if the amount of the mechanic's lien had been miscalculated when the lien was filed (of which there is no evidence in the present case), the lien would have been choate.

Petitioner bases its case primarily on the contention that the mechanic's lien is "inchoate" until a judgment is entered enforcing the lien. In support of this contention, petitioner argues (Petition, p. 9) that "until a judgment was obtained, the mechanic's lien was not enforceable in any particular amount;" that "the mere filing of a mechanic's lien, or of a suit for its enforcement, does not of itself determine the correctness or the amount of the lienor's claim" (despite the fact that the mechanic's lien specified that it was for the amount of $8,286, with interest, under the written contract between the parties); that the "statute permits the property owner to interpose any defense to the suit" and "permits any other lien claimant to contest the mechanic's lienor's claim;" and

[4] In *Illinois* v. *Campbell*, the Court found that the state liens were inchoate, not because the amount lacked certainty, but because "neither the notices of lien nor the appointment of the receiver made definite and certain the property." (329 U. S., at 375).

that "only after the creditor has obtained a decree or judgment is the court empowered to order a sale of the property against which the lien is asserted."

Yet the same comments could be made about the liens in the *New Britain* case, and particularly about the water-rent liens there involved: until a judgment is obtained in a foreclosure suit, such liens are not enforceable;[5] the filing of the lien, or of a suit for its enforcement, does not of itself determine the final correctness or amount of the municipal claim any more or any less than does the filing of the mechanic's lien or of a suit for its enforcement (both municipal liens and the mechanic's lien being definite in amount, subject to correction in a suit for enforcement, as in the foreclosure of a mortgage lien); a property owner or other interested party is permitted to interpose any defense or other "equitable obstacle" in the suit to foreclose the municipal lien;[6] and only after the lienholder has obtained a decree is the court empowered to order a sale of the property against which the lien is asserted.[7] In view of these facts, petitioner would apparently contend, and it did contend in the *New Britain* case,[8] that the municipal liens for water-rent and taxes were inchoate and would have continued to be inchoate until the entry of a judgment enforcing the

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[5] Connecticut General Statutes (1949), Chap. 34, Sec. 758; Chap. 88, Sec. 1863. The remedy of levy and sale is not available for the collection of water-rents. While that remedy is available for the collection of municipal taxes, that fact is not a basis for distinction even between such taxes and a mechanic's lien, inasmuch as levy and sale are not an enforcement of the tax lien against the specific property covered by the lien but are a separate remedy for the collection of the taxes which must be pursued first against *personal property* of the taxpayer before the real property can be reached. Conn. Gen. Stats. (1949), Chap. 88, Sec. 1836.

[6] *City of Bridgeport* v. *Equitable Title & Mortgage Co.*, 106 Conn. 542, 551, 138 Atl. 452, 456 (1927).

[7] Connecticut General Statutes (1949), Chap. 88, Sec. 1863.

[8] Brief for the United States in the *New Britain* case (Docket No. 92, October Term 1953), esp. pp. 7-8.

liens. However, this Court held otherwise; it held that the municipal liens, upon which no foreclosure suit had even been filed and no "judgment" had been entered, "attached to the specific property and became choate prior to the attachment of the federal tax liens." (347 U. S. at 86.)

The holding of this Court in the *New Britain* case is directly applicable to the facts in the present case. Under this holding, the previously recorded mechanic's lien "attached to the specific property and become choate prior to the attachment of the federal tax liens," and the priority of these liens is determined by the principle of law that "the first in time is the first in right."

B. The Courts Below Correctly Found that United States v. Security Trust & Savings Bank, 340 U. S. 47 (1950) and the Other Cases Involving Attachment and Similar Liens Were Inapplicable to the Facts of This Case.

The principal reason urged by petitioner for granting the writ is petitioner's contention that the decision below "departs from the rule laid down" by this Court in the *Security Trust* case and the recent cases which follow it.[9]

The Court of Appeals held that those decisions were not applicable "in the factual setting presented by the current appeal," and that instead the rule of *first in time, first in right* "reported by Chief Justice Marshall, quoted in *New Britain* and adumbrated by Mr. Justice Story" was applicable. (p. 24a of Appendix A to Petition.)

A contention similar to petitioner's present argument

[9] *United States* v. *Acri*, 348 U. S. 211; *United States* v. *Liverpool & London Ins. Co.*, 348 U. S. 215; *United States* v. *Scovil*, 348 U. S. 218. The *Scovil* case involved a landlord's lien which did not arise until *after* the federal tax liens had attached to an *insolvent* taxpayer's property; therefore that case is not relevant here.

was rejected by this Court in the *New Britain* case where the Court stated:

> "The United States in claiming priority for all its liens relies heavily on two recent cases from this Court, *United States* v. *Security Trust & Savings Bank, supra,* and *United States* v. *Gilbert Associates,* 345 U. S. 361. We do not think they are inconsistent with our decision in this case." (p. 86 of 347 U. S.)[10]

In contrast to the *New Britain* water-rent and tax liens which were choate because they met the threefold test of "choateness" before the federal tax liens arose, this Court expressly distinguished the attachment lien involved in the *Security Trust* case which failed because it was inchoate:

> "Such inchoate liens may become certain as to amount, identity of the lienor, or the property subject thereto only at some time subsequent to the date of federal liens attach and cannot hen be permitted to displace such federal liens. Otherwise, a State could affect the standing of federal liens, contrary to the established doctrine, simply by causing an inchoate lien to attach at some arbitrary time even before the amount of the tax, assessment, etc., is determined. Accordingly, we concluded in *Security Trust* 'that the tax liens of the United States are superior to the inchoate attachment lien * * *' *Id.,* at 51." (347 U. S. at 86-7.)

The nature of a statutory lien is determined by the statute which creates it. If the statute makes the lien contingent on any subsequent event, such as the outcome of another suit, the lien remains inchoate until that event takes place. This Court recognized that fact as controlling in the *Security Trust* case when it pointed out that the California attachment statute enabled a claimant to have

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[10] The *Gilbert Associates* case is inapplicable here in any event because it dealt with an insolvent taxpayer.

the property of his debtor attached at any time "as security for the satisfaction of any judgment that *may* be recovered." (340 U. S. at 49.)[11] Similarly in the *Acri* case, which involved an attachment ancillary to a suit for damages for wrongful death, the Court said:

> "We hold here that the attachment lien in Ohio is an inchoate lien because, at the time the * * * attachment issued, the fact and the amount of the lien were contingent upon the outcome of the suit for damages." (348 U. S. at 214.)

The *Liverpool* case involved a garnishment lien which, like the attachment lien, was merely in aid of, ancillary to, and contingent upon the outcome of the principal suit involving an independent cause of action unrelated to the property subject to the lien.

On the other hand, the lien created by the Illinois Mechanic's Lien Act is an entirely different kind of lien. It possesses its own vitality and stands on its own feet. It is fixed and definite when recorded and its existence is not contingent upon any subsequent event whatsoever. It is not in aid of, ancillary to, or contingent upon the outcome of a principal suit upon an independent cause of action. The foreclosure suit is for the enforcement of an existing and choate lien just as this Court in the *New Britain* case held that the municipal liens were choate before enforce-

[11] Having thus found that the attachment lien in the *Security Trust* case was "inchoate" and "contingent upon a judgment," the Court stated that the attaching creditor could not be accorded the status of a judgment creditor retroactively by any "relation back" of the judgment lien to the date of the attachment. Respondents have never contended that the mechanic's lienor had the status of a judgment creditor before the entry of the foreclosure decree, nor have they argued for any "relation back." They have contended, and now contend, that each event was effective on the date of its actual occurrence: the mechanic's lien became choate when it was recorded; the foreclosure suit became *lis pendens* when it was commenced; and the foreclosure decree became immune from collateral attack when it was entered.

ment in a foreclosure suit. "It is a mistake to suppose that the court creates or confers the lien by its decree. The court only finds and declares that it was in existence." *Clark* v. *Moore*, 64 Ill. 273, 279 (1872).

There are sound reasons of equity and of public policy for these statutory liens of materialmen and laborers who improve the very property on which they are given a lien. The policy of the law has long been to encourage the prompt payment of debts to wage earners, laborers and materialmen. The property to which the mechanic's lien attaches stands improved and enhanced in value to the extent of the lien, and it would result in unjust enrichment to make that lien contingent or to make it possible for any person who acquires an interest in the property subsequently, including the tax collector, to realize upon the benefits of the mechanic's labor and materials to the detriment of the mechanic himself. No such reasons exist in the case of attachment and garnishment liens, and the cases involving such liens are not controlling in the present case.

C. The Decision Below Is Consistent With the Decisions of This Court and Courts of Appeals Involving the Relative Priority of Mechanics' Liens and Federal Tax Liens.

The only case in this Court which involved the relative priority between a federal tax lien and a mechanic's lien is *United States* v. *Colotta*, 350 U. S. 808 (*per curiam*, 1955). In that case the government's unopposed petition for certiorari (p. 2) stated that the "Question Presented" was:

> "Whether a lien of the United States for unpaid federal taxes, arising under Sections 3670 and 3671 of the Internal Revenue Code of 1939, is superior to a statutory mechanic's lien accorded by state law to con-

> tractors, laborers and materialmen, where the contract giving rise to the mechanic's lien had been performed *but no steps had been taken to file or enforce such lien before the federal lien arose and was recorded.*" [Emphasis supplied.]

Thus when the federal lien attached, the mechanic's lien had not become "choate" under the threefold test in *New Britain*,[12] inasmuch as no notice had been recorded establishing the identity of the lienor, the property subject to the lien and the amount of the lien. Furthermore, as the government's petition for certiorari in that case (p. 14a, Appendix A of present Petition) pointed out: "respondents had neither recorded their contracts • • • nor filed the *lis pendens* notice". Hence, the vital facts in the *Colotta* case were precisely the reverse of the facts in the present case in which the mechanic's lien was recorded before the federal tax liens arose and the foreclosure suit to enforce that lien had been commenced before, and was pending when, the federal tax liens arose.

In *United States* v. *Kings County Iron Works*, 224 F. (2d) 232 (C. A. 2, 1955), as in the *Colotta* case, the federal tax lien attached before the mechanic's lien was recorded, and was therefore held to be entitled to priority under the rule that the "first in time is first in right."[13]

However, in *United States* v. *Albert Holman Lumber Co.*, 206 F. (2d) 685 (C. A. 5, 1953), the Court of Appeals for the Fifth Circuit considered the relative priority of a federal tax lien and a *previously* recorded mechanic's lien. The Court held that the mechanic's lien was entitled to priority. In that case the government advanced substantially the same arguments as it relies upon in its petition in the present case. In overruling those arguments, the Court said:

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[12] 347 U. S. 81, 84.

[13] To the same effect is *U. S.* v. *Eisinger Mill & Lumber Co.*, 202 Md. 613, 98 Atl. (2d) 81 (1953).

> "In this case the United States first argues that under the law of Alabama the liens of the appellees were inchoate and that therefore we may reverse the judgment on this basis. More specifically it argues that no complete and specific liens attach to the property under the state law until judgment is entered establishing the liens. Restating the same argument in different words, the Government asserts that until the court or the jury finds the existence of a materialman's lien, no right against or interest in the property has been established. We do not at all agree.
>
> "Under the law of Alabama, * * * the liens of mechanics and materialmen attach from the commencement of the building or improvement * * *. Such liens are subject, however, to be defeated and lost if the claims are not verified and filed * * *. After verification and filing their liens were complete * * *." (206 F. (2d) at 688.)

In denying rehearing, the Court rejected the contention that the *Security Trust* decision[14] was applicable to the facts of the case, saying that whereas the attachment lien in the *Security Trust* case was "contingent",

> "In the instant case a different situation is presented in that the Government here claims that its general tax lien is entitled to priority over appellee's materialmen's liens which were specific and perfected under Alabama law long before the federal lien arose." (208 F. (2d) at 114.)

Therefore, the Court of Appeals for the Fifth Circuit held in the *Holman* case, as did the Court below in the present case, that the recorded mechanic's lien was entitled to priority over subsequently arising federal tax liens.[15] Pe-

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[14] 340 U. S. 47.

[15] To the same effect are the decisions in *In re Caswell Constr. Co.*, 13 F. (2d) 667 (D. C., N. D. N. Y., 1926) and *Great American Indemnity Co.* v. *U. S.*, 120 F. Supp. 445, 450-1 (D. C., W. D. La., 1954), in which the Court said: "In the Security Trust case it was held the attachment was really not a lien at all but merely

titioner has not cited any contrary decision of a Court of Appeals, involving a mechanic's lien recorded before federal liens attached, and we have found none.[16]

It is therefore apparent that all decisions of this Court and Courts of Appeal, involving the relative priority of mechanics' liens and federal tax liens, are entirely consistent with the decisions of the courts below holding that a recorded mechanic's lien is entitled to priority over a subsequent federal tax lien.[17]

II. THE TITLE OF THE RESPONDENTS TO THE PROPERTY INVOLVED IS PROTECTED BY THE DOCTRINE OF LIS PENDENS AND THE RULE AGAINST COLLATERAL ATTACK WHICH PRECLUDE THE RELIEF SOUGHT AND CONFIRM THE CORRECTNESS OF THE DECISION BELOW.

Petitioner's tax liens arose not only after the mechanic's lien was recorded, but also after the mechanic's lien fore-

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a right to perfect a lien. The Louisiana lien is a perfect lien with a right to reduce to a perfect judgment. Because they are not judgments they gain no special standing by Section 3672—but because they are choate liens they would be entitled to priority if recorded prior to the federal tax liens."

[16] The Supreme Court of Washington reached a contrary result in *Fleming* v. *Brownfield*, decided November 17, 1955 (1956 C. C. H. par. 9138, reprinted in Appendix C of Petition for Certiorari, pp. 41a-53a), by an erroneous application of principles which this Court has confined to cases where the taxpayer is insolvent, thereby bringing into operation § 3466 of the Revised Statutes (31 U. S. C. § 191). Thus the Washington Court relied principally upon the decision in *U. S.* v. *Gilbert Associates*, 345 U. S. 361 (1953), which this Court, in *U. S.* v. *New Britain*, 347 U. S. 81, 87 (1954), held inapplicable where the taxpayer was not insolvent.

[17] The decision of the courts below is also in conformity with the decisions of this Court and lower Federal courts which consistently have held that a mechanic's lien is "perfected" under Section 67(b) of the Bankruptcy Act (11 U. S. C. Sec. 107(b)) when it is recorded, irrespective of whether a suit has been filed for its enforcement. *Henderson* v. *Mayer*, 225 U. S. 631, 636 (1912); *American Coal Burner Co.* v. *Merritt*, 129 F. (2d) 314, 315 (C. A. 6, 1942); *In re Etherton*, 88 F. Supp. 874, 877 (D. C. Cal., 1950).

closure suit had been filed in the Circuit Court of Cook County, Illinois, a court of general equity jurisdiction. Petitioner filed the present suit seeking a resale of the property to satisfy its tax liens six years after the commencement of the foreclosure suit, four years after the foreclosure decree had been entered and the foreclosure sale had been held and the proceeds of the sale had been completely distributed, and a year after the property had passed into the hands of respondents as good faith purchasers for value. The established rules of *lis pendens* and of the immunity of judicial proceedings from collateral attack prevent any such unjust result as petitioner seeks here, and confirm the correctness of the decision below.

Under the rule of *lis pendens*, any interest in or lien upon real estate arising during the pendency of an equity suit involving such real estate is subject to the outcome of the suit, and anyone acquiring such an interest or lien is bound by the proceedings in such case as if he had been a party thereto.[18] The doctrine is well settled in Illinois both by common law and by statute. *Loomis* v. *Riley*, 24

[18] This long-established rule of *lis pendens*, applicable to equity suits affecting title to real estate, was not involved in *United States* v. *Security Trust & Savings Bank*, 340 U. S. 47, in which the words "lis pendens" were used in the sense of meaning only constructive notice in an attachment suit. Pomeroy has expressed the meaning of the rule of *lis pendens* in the sense applicable to the real property involved in this case, as follows: "Where a litigation is pending between a plaintiff and a defendant as to the right to a particular estate, the necessities of mankind require that the decision of the court in the suit shall be binding, not only on the litigant parties, but also on those who derive title under them by alienations made pending the suit, whether such alienees had or had not notice of the pending proceedings. If this were not so, there could be no certainty that the litigation would ever come to an end. * * * *lis pendens* extends to all *equitable* suits which involve the title to a specific tract of land, or which are brought to establish any equitable estate, interest or right in an identified parcel of land, or to enforce any lien, charge, or encumbrance upon land." (Pomeroy's Equity Jurisprudence (5th Ed. 1941), Secs. 632, 635).

Ill. 307, 310 (1860); *Norris* v. *Ile*, 152 Ill. 190 (1894); *Alexander Lumber Co.* v. *Kellerman*, 358 Ill. 207, 214-15 (1934); Ill. Rev. Stats. (1955) Ch. 22, Sec. 53. No acquisition of an interest in real estate during the pendency of a proceeding can "affect the power of the court to proceed to a final decree" (*Mellen* v. *Moline Malleable Iron Works*, 131 U. S. 352, 370 (1889)), "nor affect the title of him who bought under the decree" (*Eyster* v. *Gaff*, 91 U. S. 521, 524 (1875)).

Rules of real property law necessarily involve real estate which has a definite location within the State and it is most appropriate that the State's property law should govern. This Court, in a tax case, referring to state decisions as to tenancies by the entirety, held in *Tyler* v. *United States*, 281 U. S. 497, 501 (1930):

> "These decisions establish a state rule of property, by which, of course, this court is bound."

In *Brine* v. *Hartford Insurance Co.*, 96 U. S. 627, 634 (1877), on appeal from Illinois, this Court held that title coming through a judicial proceeding is a transfer of title governed by state law binding on a Federal court. This principle applies equally to the rule of *lis pendens* since it too is a state rule of property governing titles coming through judicial proceedings. *Romeu* v. *Todd*, 206 U. S. 358 (1907).

In the present case, just as this Court said in discussing the rule of *lis pendens* in *Romeu* v. *Todd*, "disregarding fundamental rules of real property" would be "creating confusion and uncertainty, and hence tending to the destruction of the rights of innocent third parties." (206 U. S., at 370.)

When the United States acquires an interest in or lien upon real property, it is bound by the rule of *lis pendens* regardless of its sovereign status or its constitutional

immunity from suit without its consent.[19] Freeman on Judgments (5th Ed. 1925), Vol. I, Sec. 526; *Ward* v. *Congress Construction Co.*, 99 F. 598 (C. A. 7, 1900); *United States* v. *Calcasieu Timber Co.*, 236 F. 196 (C. A. 5, 1916); *United States* v. *Mayse*, 5 F. (2d) 885 (C. A. 9, 1925), cert. denied 269 U. S. 580; and see also *United States* v. *Alabama*, 313 U. S. 274, 281 (1941). A state court equity proceeding is not terminated by the mere fact that the United States subsequently acquired an interest in property involved in the proceeding; and the state court is not thereby deprived of jurisdiction to proceed to a conclusion, binding upon such subsequently acquired interest. *United States* v. *Bank of New York Co.*, 296 U. S. 463 (1935).

Therefore, in the equity suit to foreclose the mechanic's lien on the real property involved herein, petitioner, like any other person "acquiring an interest in or lien on the property" after the filing of the suit, was "deemed a subsequent purchaser and * * * bound by the proceedings to the same extent and in the same manner as if he [it] were a party thereto."[20]

It is well settled that a valid decree cannot be collaterally attacked by a party to the proceedings (Frederick's Brewing Co.) or by one in privity to such a party (petitioner) which is bound by the proceedings as if it had been a party. *Mellen* v. *Moline Malleable Iron Works*, 131 U. S. 352 (1889); *Sunshine Coal Co.* v. *Adkins*, 310 U. S. 381, 402, 403 (1940); *United States* v. *Nourse*, 9 Pet. (34 U. S. 8 (1935); *Lion Bonding Co.* v. *Karatz*, 262 U. S. 77, 90 (1923). In the *Mellen* case, this Court stated:

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[19] "* * * the immunity enjoyed by the United States as territorial sovereign is a legal doctrine which has not been favored by the test of time." *National City Bank* v. *Republic of China*, 348 U. S. 356, 359 (1955).

[20] Ill. Rev. Stats. (1955) Ch. 22, Sec. 53, which is declaratory of common law.

"* * * Mellen, the trustee for Sophie H. Boyd, acquired his rights *pendente lite*.

"* * * that sale and conveyance could not affect the power of the court to proceed to a final decree, so far as his interest in the property was concerned. * * * The present proceeding is an attempt, upon the part of a purchaser *pendente lite*, to relitigate, in an original, independent suit, the matters determined in the suit to which his vendor was a party. That cannot be permitted, consistently with the settled rules of equity practice." (131 U. S., at 370.)

Similarly, petitioner's present suit can be regarded in no other way than as a collateral attack upon the foreclosure decree, by which petitioner, which acquired a lien on the property *pendente lite*, was bound to the same extent and in the same manner as if a party to that suit. As the District Court below stated, in giving this additional reason for dismissing the complaint: "Plaintiff [petitioner] in effect is asking that the former suit be relitigated in this court."

This additional reason for dismissing the complaint is in the public interest. Purchasers of titles acquired through valid judicial proceedings should be entitled to rely upon their stability and not find those titles beclouded and rendered unmerchantable by intervening claims, such as those of petitioner. Over a century ago, this Court, in *Voorhees v. United States Bank*, 10 Pet. (35 U. S.) 449 (1836), recognized the importance of protecting, from collateral attack, titles acquired through judicial proceedings in courts of competent jurisdiction (even if the proceedings involved errors). The Court said:

"It would be a well-merited reproach to our jurisprudence, if an innocent purchaser, no party to the suit, who had paid his money on the faith of an order of a court, should not have the same protection under an erroneous proceeding, as the party who derived

> the benefit accruing from it. * * * This great rule [against collateral attack] established for the protection of purchasers on the faith of judicial process, will be utterly prostrated; * * *. The purchaser is not bound to look beyond the decree, when executed by a conveyance, if the facts necessary to give jurisdiction appear on the face of the proceedings, nor to look further back than the order of the court." (35 U. S. at 475, 477-8.)

A court should not "disturb long-established rules of real property law" thereby upsetting "a multitude of titles." (*Greenwald* v. *McCarthy,* 402 Ill. 135, 143, 83 N. E. (2d) 491, 494 (1949)) It is especially important that a Federal Court should not disturb state rules of real property law or the titles dependent thereon. As the Court of Appeals for the Eighth Circuit stated in *United States* v. *Hutcherson,* 188 F. (2d) 326, 330 (C. A. 8, 1951):

> "We do not conceive it to be an appropriate exercise of the power and authority of a federal court to strike down a rule of property, not repugnant to any law of the United States, long established in the state, and upon which many valuable property rights are based."

Petitioner's own complaint seeks to invoke the doctrine of *lis pendens* by praying "that the defendants and all persons claiming under them or any of them *subsequent to the commencement of this action* be barred and foreclosed." (R. 11.) While the Petition does not discuss the rule of *lis pendens* pertaining to equity proceedings affecting real estate or the rule against collateral attack, it does cite (Footnote 5, pps. 11-12) certain sections of the Internal Revenue Code which are inapplicable to the issues of this case (*supra,* p. 4). In the same footnote, the Petition cites the same case that petitioner relied upon heavily for its contention on the "*lis pendens* argument"

below, namely, *Metropolitan Life Insurance Co.* v. *United States*, 107 F. (2d) 311 (C. A. 6, 1940). Since that case involved only the exercise of a private power of sale given under a Michigan mortgage, and not the filing of a foreclosure suit in an equity court of competent jurisdiction nor the entry of a decree of foreclosure, the principles of *lis pendens* and the immunity of judicial proceedings from collateral attack clearly were not involved in the decision.[21]

None of the decisions of this Court upon which petitioner relies involved comparable facts nor did they involve the important property rules of *lis pendens* and collateral attack. In none of those cases had an equity suit been commenced against real property *before* the federal tax liens attached. In each of those cases the United States asserted its tax lien before any judgment or decree had been entered or a sale of the property had been made. At that time the courts had before them the property or its proceeds and also the competing lien claimants, as well as the taxpayer. The government did not attempt in any of those cases, as it does here, to reach the property itself by a separate and subsequent suit, long after the proceedings had been completed and the property had passed into the hands of third party purchasers for value.

CONCLUSION.

This case was correctly decided by both courts below. The unanimous decision of this Court in *United States* v. *New Britain*, 347 U. S. 81 (1954) is conclusive under the

[21] The Michigan courts have "repeatedly held that a foreclosure under the statute, is an act of the party and not a judicial proceeding." *Guardian Depositors Corp.* v. *Powers*, 296 Mich. 553, 296 N. W. 675, 679 (1941). Moreover, the tax liens in the *Metropolitan* case had arisen "on August 17, 1932, prior to foreclosure" (107 F. (2d), at 312).

facts with respect to the priority question. The real property rules of *lis pendens* and the immunity of judicial proceedings from collateral attack preclude the maintenance of petitioner's present suit, and confirm the correctness of the decisions below dismissing the suit. There is no conflict with any decision of this Court or of any Court of Appeals. To the contrary, the decision below is in accordance with the pertinent decisions of this Court and with principles of equity long followed by this Court and by all courts throughout the land. For the foregoing reasons, the Petition for Certiorari should be denied.

Respectfully submitted,

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March 15, 1956.

APPENDIX A.

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois,
Eastern Division.

UNITED STATES OF AMERICA,
Plaintiff,
vs.
FREDERICK'S BREWING COMPANY, ET AL.,
Defendants.
No. 53-C-2232.

MEMORANDUM.

Defendant here has moved to dismiss the complaint on the ground that it fails to state a claim upon which relief can be granted. The complaint may be summarized as follows:

An assessment for delinquent income taxes was made against Frederick's Brewing Company by the Commissioner of Internal Revenue on November 13, 1947; the assessment list was received by the Collector on November 17, 1947. No part of this assessment has been paid. Later assessments were made against the various successors to that Company. At the time of these assessments, the Company was the owner of described real estate. On September 2, 1947, a mechanic's lien was filed against the described property, by Fred W. Deutsch. Suit was filed to foreclose this lien on November 13, 1947, and the property was sold on order of court in this suit on September 28, 1950.

Various persons may have an interest in this real estate. The plaintiff prays for judgment:

> "That all persons having liens upon or claiming any interest in the property or rights to property hereinabove described be required to submit their claim; that the merits of all claims to and liens upon the property be finally determined; that the defendants and all persons claiming under them or any of them subsequent to the commencement of this action be barred and foreclosed of all right, title and interest, or lien and claim to the property and all part thereof; that the lien of this plaintiff for its taxes assessed be established and enforced against the property described in its complaint; that the property be ordered sold, in accordance with the law and the practice of this Court and that the fund resulting from such sale be ordered distributed according to the findings of the Court, in accordance with the rights and interests of the parties defendant in this suit and the United States."

It is defendant's contention that the complaint shows on its face that the plaintiff has no right to enforce its lien at this time because (1) the Government's lien did not attach until after the mechanic's lien, and is therefore subservient to it; and (2) this junior lien can not now be enforced because at the time it attached it was subject to the foreclosure suit, and has been wiped out by the judgment in that suit.

The defendant has filed with its motion an affidavit setting forth additional facts, and plaintiff has in its brief presented certain facts which it offers to support by affidavit. I will assume that the latter are correct, without requiring a formal affidavit. Since matters outside the pleadings have been introduced, the motion will be treated under Rule 12(c) as a motion for summary judgment and disposed of under Rule 56. There are no material issues of fact. As will appear later, the date of the foreclosure decree is not important.

The Government admits that its lien did not attach before November 17, 1947, the date when the assessment list was received by the Collector (26 U. S. C. A. sec. 3670, 3671; *United States* v. *Ettelson,* 159 F. 2d 193, 196 (7th, C. C. A., 1947). It contends, however, that defendant's mechanic's lien was not complet and perfect until it had been reduced to judgment. A specific and perfected state lien will take precedence over a lien for federal taxes. Whether or not a lien will be considered complete is determined by federal law (*United States* v. *Waddill,* 323 U. S. 353, 356 (1945)). *Illinois* v. *Campbell,* 329 U. S. 362, 375 (1946) set forth the criteria by which a lien may be tested, and found the "long established rule" to be that three elements must exist: (1) the identity of the lienor, (2) the amount of the lien, and (3) the identity of the property to which it attaches.

To apply the federal test to the lien, it is necessary to determine by reference to state law what its nature is. A claim was filed as a Notice of Mechanic's Lien describing the property, with the Clerk of the Circuit Court on September 2, 1947, for work completed May 19, 1947, under a contract dated February 14, 1946. A lien for services, labor or material is given by Section 2 of Chapter 82 of the Illinois Revised Statutes. Section 7 of the same Chapter provides that:

> "No contractor shall be allowed to enforce such lien against or to the prejudice of any other creditor or incumbrancer or purchaser, unless within four months after completion, * * * he shall either bring suit to enforce his lien therefor or shall file with the clerk of the Circuit Court * * * a claim for the lien * * *."

It has been held by the Illinois courts that this statutory lien exists from the time of the contract in an inchoate condition, and is fixed against the property at the time the notice is filed: *Robertson* v. *Huntley and Blazier Co.,* 351

Ill. App. 378, 384 (1953); *Schoenberg Mfg. Co.* v. *Broadway Hotel Corp.*, 259 Ill. App. 40, 42 (1930); *United Cork Companies* v. *Volland*, 365 Ill. 565, 573 (1937). In other words, the lien exists from the time of the contract, and may be defeated only through the failure to file the required notice. Filing perfects and completes the claim.

A federal interpretation of a very similar state statute is found in *United States* v. *Holman*, 206 F. 2d 685 (C. C. A. 5th, 1953). There, a mechanic's lien was filed and suit commenced thereon before the federal lien attached. Arguments similar to those advanced by the Government here were overruled by the court:

> "In this case the United States first argues that under the law of Alabama the liens of the appellees were inchoate. * * * We do not at all agree.
>
> "Under the law of Alabama, * * * the liens of mechanics and materialmen attach from the commencement of the building * * *. Such liens are subject, however, to be defeated and lost if the claims were not verified and filed. * * * After verification and filing their liens were complete * * *."

It was held that the liens were complete under federal law, meeting the tests set forth in *Illinois* v. *Campbell*, *supra*, and took precedence over a federal lien for taxes which was filed later. A similar result was reached in *United States* v. *Martin Fireproofing Corporation*, 168 F. 2d 808 (C. C. A. 6, 1948), where the Court concluded with the following reasoning, applicable also to this case:

> "The essential principle upon which the mechanic's lien rests is that of unjust enrichment. It is uncontradicted in this record that the giving of a priority to the United States over the mechanic's lien also gives the United States the enhancement of the value of the property which resulted from the work performed and the material supplied by the appellee." (Page 811.)

The lien in the present case attached and was complete,

under Illinois law, at the time it was filed, September 2, 1947. The identity of the lienor, the amount of the lien, and the property to which it attached, were known at that time. It therefore takes precedence over plaintiff's lien, which attached no earlier than November 17, 1947.

However, though the defendant has the prior lien, plaintiff here asks that the property be re-sold, and there is of course the possibility that there might be something left for the junior lien. However, that remedy cannot be followed at this time. The plaintiff acquired its right after November 15, 1947, and when suit was filed to foreclose the lien. Any interest in real estate acquired after the filing of such a suit is subject to the outcome of the pending litigation under the familiar doctrine of *lis pendens*. In Illinois, this is true at common law (*Alexander Lumber Co.* v. *Kellerman*, 358 Ill. 207-214, 5 (1934); *Weber* v. *Kemper*, 320 Ill. 11, 19-20 (1925)); and by statute (Ch. 22 Ill. Rev. Stat. 53). Plaintiff in effect is asking that the former suit be re-litigated in this court. Plaintiff apparently did not intervene in the former suit, and has now no remedy in that regard.

The motion to dismiss the complaint will be allowed.

PHILIP L. SULLIVAN,
Judge.

November 8th, 1954.

APPENDIX B.

Illinois Chancery Act, Section 53 (Illinois Revised Statutes (1953) Chap. 22, Section 53):

> "That every suit in equity, proceeding to sell real estate of decedent to pay debts, or other suit in the nature of suits in equity affecting or involving real property shall, from the time of the filing of the complaint or petition, be constructive notice to every person subsequently acquiring an interest in or a lien on the property affected thereby, and every such person and every person acquiring an interest or lien as aforesaid, not in possession of said property and whose interest or lien is not shown of record at the time of filing such complaint or petition, shall, for the purposes of this Act, be deemed a subsequent purchaser and shall be bound by the proceedings to the same extent and in the same manner as if he were a party thereto. * * *"

MAY 4 1956
HAROLD B. WILLEY, CL

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955.

No. 699

UNITED STATES OF AMERICA,
Petitioner,

vs.

WHITE BEAR BREWING CO., INC., AND CHICAGO TITLE AND TRUST COMPANY, AS TRUSTEE, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

PETITION FOR REHEARING OR, IN THE ALTERNATIVE, TO REMAND TO THE COURT OF APPEALS FOR CONSIDERATION OF UNDECIDED ISSUE.

KENNETH F. BURGESS,
EDWARD P. SALTIEL,
WILLIAM H. AVERY, JR.,
GEORGE RAGLAND, JR.,
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SIDLEY, AUSTIN, BURGESS & SMITH,
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THE DUNTHORP-WARREN PRINTING COMPANY, CHICAGO

IN THE

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PETITION FOR REHEARING OR, IN THE ALTERNATIVE, TO REMAND TO THE COURT OF APPEALS FOR CONSIDERATION OF UNDECIDED ISSUE.

The respondents, White Bear Brewing Co., Inc., and Chicago Title and Trust Company, as Trustee, respectfully request this Court to modify the *per curiam* order of April 9, 1956, (1) by vacating so much of the order as reversed the judgment below, and placing the case on the calendar for briefs and oral argument, or, in the alternative, (2) by remanding the case to the Court of Appeals for consideration of the issue as to whether the United

States is barred from collaterally attacking a judgment of foreclosure entered by a State equity court, which had exclusive jurisdiction of the real estate involved, in a proceeding which was pending when the Government's tax liens arose.[1] That issue was expressly left undecided by the Court of Appeals, and was not presented in the petition for certiorari or passed upon by this Court.

STATEMENT OF THE CASE ON REHEARING.

The Government's suit involves vital constitutional issues concerning the relative powers of the Federal and State governments. It seeks: first, to take real property away from respondents who had previously purchased the property and made a mortgage loan on it in good faith reliance on title coming through a State court judicial proceeding foreclosing an existing mechanic's lien; and second, to have the property resold to satisfy federal tax liens (on account of taxes of a prior owner of the property) which did not arise until after the recording of the mechanic's lien and after the commencement of the State court foreclosure suit.

The case therefore involves two issues:

(1) Whether a federal tax lien, when it arises, attains priority over an existing and previously recorded mechanic's lien (referred to as the "priority issue"), and,

(2) Whether the United States, in a new suit filed long after respondents acquired title to real prop-

[1] In an equity suit involving title to real estate, such as the mechanic's lien foreclosure case, "the necessities of mankind" have long been recognized as requiring that *all interests acquired during the pendency of the suit* be bound by the decision of the court in that suit, under the rule of *lis pendens*. (Pomeroy's Equity Jurisprudence [5th Ed. 1941], Sec. 632, 635; *Secombe* v. *Steele*, 20 Howard [61 U. S.] 94, 105 [1857]; *Eyster* v. *Gaff*, 91 U. S. 521, 524 [1875]). This principle, which is applicable to all equity suits affecting title to real estate, was not involved in *United States* v. *Security Trust & Savings Bank*, 340 U. S. 47 (1950).

erty coming through a mechanic's lien foreclosure decree and sale, can collaterally attack the foreclosure decree previously entered in a State court proceeding which was in process of adjudication when the federal lien arose (the "*lis pendens-collateral attack* issue").

The District Court decided both of these issues in favor of respondents and dismissed the complaint.[2]

The Court of Appeals, affirming, decided the priority issue in respondents' favor, but found it unnecessary to reach the second issue, stating as follows (227 F. 2d 359, at 370):

> "While we think defendants' position resting upon their *lis pendens* argument suggest some merit, it is unnecessary to reach that point because the judgment appealed is hereby affirmed."

The Government's petition for certiorari did not raise the *lis pendens-collateral attack* issue. Neither the *per curiam* order granting certiorari and reversing the judgment below, nor the dissenting opinion, makes any reference to this issue.

I.

IN VIEW OF THE WIDESPREAD EFFECT OF THE DECISION ON THE QUESTION OF THE RELATIVE PRIORITY OF LIENS, THE SUMMARY REVERSAL SHOULD BE VACATED AND THE CASE PLACED ON THE CALENDAR FOR BRIEFS AND ORAL ARGUMENT.

The question whether a recorded mechanic's lien is superior or inferior to a subsequent federal tax lien is of

[2] The District Court treated the motion to dismiss as a motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure. That Court found that the mechanic's lien was entitled to priority, and that the relief sought by the Government, as a junior lien-holder, was precluded by the doctrine of *lis pendens* and the rule against collateral attack.

substantial and widespread public importance, especially to labor and the construction industry. The decision of this question, and the implications of the decision, are of such significance that it is most desirable to have the benefit of an opinion of this Court, after submission of briefs and argument.

From the *per curiam* order, it appears that a perfected lien existing under State law can not prevail against a subsequent federal tax lien under Section 3670, unless and until reduced to judgment, although there is no such provision in the federal statutes. It should be made clear whether this Court intends to overrule *U. S.* v. *New Britain*, 347 U. S. 81 (1954), or to distinguish it. If this Court intends any of these results, the commercial world and the Bench and Bar should be so informed by an opinion of this Court.

II.

THE CASE SHOULD BE REMANDED TO THE COURT OF APPEALS TO DECIDE THE LIS PENDENS — COLLATERAL ATTACK ISSUE WHICH IT EXPRESSLY LEFT UNDECIDED.

Consideration of the *lis pendens-collateral attack* issue has not been given by the Court of Appeals or by this Court, although on that ground alone the judgment of the District Court was correct. Respondents have contended throughout that, apart from the priority issue, the relief sought by the Government, which acquired its liens *pendente lite*, is barred by the rules of *lis pendens* and the immunity of judgments from collateral attack.

This issue, which the Court of Appeals did not decide, involves important questions concerning the interrelations between federal administrative power in the collection of

taxes[3] and State judicial power and between federal action and established State rules of real property law. Among these questions are the following:

1. Is the United States, upon acquiring an interest in real estate during the pendency of a State court judicial proceeding, immune from application of the doctrine of *lis pendens* which has long been established by common law and statute as a rule of real property in the several States?

2. After a State court in an equity proceeding has acquired jurisdiction over real property and all parties then having any interest in the property, may the United States disregard such pending proceeding and through a subsequent independent suit take the property to satisfy a tax lien which arose after the State court proceeding was instituted?

3. May the United States collaterally attack a judgment of a State court, by which it was bound as if a party thereto, by a new suit filed years after such judgment was entered?

4. May the United States attack the title of a purchaser of real property derived through a State court mechanic's lien foreclosure sale, by a new suit filed years after the sale had been confirmed and the proceeds of the sale distributed?

In order for the Government to prevail in the present case, it would be necessary to answer all of these questions in the affirmative. Any such result would extend federal power far beyond any limit authorized by the Federal Constitution and statutes or by the decisions of this Court, and would deprive the States of powers in judicial proceedings which heretofore have always been recognized. A carefully considered resolution of these questions, which comprise the *lis pendens-collateral attack* issue, is im-

[3] In this case, the federal administrative power was exercised merely by delivery of the assessment list to the collector and demand for payment.

portant not only to the administration of justice in State courts but to the stability of real estate titles throughout the country.

If this Court adheres to its decision to reverse the judgment of the Court of Appeals on the priority issue, then the case should be remanded to the Court of Appeals for consideration of the *lis pendens-collateral attack* issue which that Court did not decide. The suggested procedure is consistent with this Court's practice in similar cases in the past, the most recent instance having been in No. 298, October Term, 1955, *Union Trust Co., et al.* v. *Eastern Air Lines, Inc.* in which this Court entered the following order on February 27, 1956:

> "On consideration of the petition for rehearing, the order of December 5, 1955 [granting the petition for writ of certiorari and reversing the judgment below] is reopened and is modified by directing that the case be remanded to the Court of Appeals to permit that court to pass upon the several issues left undecided by our reversal of its judgment."

Remandment of the *lis pendens-collateral attack* issue to the Court of Appeals, which expressly left that issue undecided, rather than to the District Court in the first instance, will promote orderly and expeditious procedure.

CONCLUSION.

For the foregoing reasons, respondents request this Court to vacate so much of the *per curiam* order of April 9, 1956 as reversed the judgment below, and to place the case on the calendar for briefs and oral argument; or, if such request is denied, to modify the *per curiam* order of April 9, 1956 and remand the cause to the Court of Appeals for consideration of the remaining issue presented by this case.

Respectfully submitted,

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May 4, 1956.

CERTIFICATE OF COUNSEL.

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for purposes of delay.

WILLIAM H. AVERY, JR.